ORAL ARGUMENT SCHEDULED FOR DECEMBER 11, 2018

Consolidated Case Nos. 18-1063 & 18-1078

IN THE

United States Court of Appeals for the District of Columbia Circuit

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC,

Intervenor for Respondent.

On Petition for Review of a Decision and Order of the National Labor Relations Board and Cross-Application for Enforcement

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. The following are parties in this Court:

a. Petitioner/Cross-Respondent: Duquesne University of the Holy Spirit.

b. Respondent/Cross-Petitioner: National Labor Relations Board.

c. Intervenor for Respondent: United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC.

2. Duquesne University of the Holy Spirit is a Catholic university founded by priests and brothers of the Congregation of the Holy Spirit. Duquesne is organized under the Pennsylvania Nonprofit Corporation Law of 1988, as amended, and is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. Duquesne has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

B. RULINGS UNDER REVIEW

Duquesne University of the Holy Spirit petitions for review of the National Labor Relations Board's February 28, 2018 final Decision and Order in No. 06-CA-197492. The Order is reported at 366 N.L.R.B. No. 27. The Order was based on an underlying representation case, No. 06-RC-080933. The Board's April 10,

2017 Decision on Review and Order in the representation case is unreported but is available at 2017 WL 1330294.

C. RELATED CASES

The Order under review has not previously come before this or any other court. The only related case involving substantially the same parties and issues of which counsel is aware is *NLRB v. Duquesne University*, No. 18-1078 (D.C. Cir.), in which the Board filed a cross-application for enforcement of its Order. On its own motion, this Court consolidated No. 18-1078 with this case.

Respectfully submitted,

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GLOSSARY

Duquesne or the University:	Duquesne University of the Holy Spirit
McAnulty College:	McAnulty College and Graduate School of Liberal Arts
NLRA:	National Labor Relations Act
NLRB or the Board:	National Labor Relations Board
RFRA:	Religious Freedom Restoration Act
Spiritans:	Members of the Roman Catholic Congregation of the Holy Spirit
the Union:	United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC

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Intervenor for Respondent.

On Petition for Review of a Decision and Order of the National Labor Relations Board and Cross-Application for Enforcement

FINAL OPENING BRIEF FOR PETITIONER/CROSS-RESPONDENT

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review Petitioner Duquesne University of the Holy Spirit's challenge to the National Labor Relations Board's February 28, 2018 final order (Order) and the Board's cross-application to enforce the Order under Sections 10(f) and 10(e) of the National Labor Relations Act (NLRA),

respectively. 29 U.S.C. § 160(e)-(f). In its Order, the Board determined that Duquesne committed an unfair labor practice under Sections 8(a)(1) and 8(a)(5) of the NLRA, *id.* § 158(a)(1), (a)(5), by refusing to bargain with a union representing part-time, adjunct faculty at the University's McAnulty College and Graduate School of Liberal Arts (McAnulty College). The Board's Order directed Duquesne to bargain with the union. Duquesne's petition for review was filed on February 28, 2018. The Board's cross-application for enforcement was filed on March 15, 2018. The NLRA does not impose time limits for filing petitions for review or enforcement cross-applications.

INTRODUCTION

Duquesne University of the Holy Spirit is a Catholic university, founded by priests and brothers of the Congregation of the Holy Spirit (Spiritans) in 1878. Duquesne contributes to the work of the Catholic Church by seeking to unite two orders of reality—faith and reason—that are often seen as antithetical. It acts on its belief that the academic work of the University across all disciplines is the work of the Church and contributes to the Church's mission of evangelization.

Consistent with Catholic teachings, Duquesne collectively bargains with unions representing non-faculty staff. The question in this case is whether the National Labor Relations Board (NLRB or the Board) has authority to require Duquesne to bargain with certain of its faculty members consistent with the

Religion Clauses of the First Amendment. It does not. As this Court has already explained in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), if a university (1) holds itself out as having a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with a recognized religious organization, then the Board has no jurisdiction or power to compel bargaining between the university and its faculty. *Id.* at 1347.

The reasons the Board lacks jurisdiction over faculty at a university that meets these criteria are thoroughly set out in *Great Falls*. As the Supreme Court recognized in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), teachers play a critical role in a religious school's ability to carry out its religious mission, regardless of the subjects they teach. Recognition of a faculty union risks infringing upon a religious school's First Amendment rights because it subjects the school's religious mission to the coercive pressures of collective bargaining and potential unfair labor practice charges, which the Board would in effect referee. *See id.* at 502-04. And any effort by the Board to determine whether the work of the petitioned-for faculty is "sufficiently religious" to warrant exemption from the Board's jurisdiction risks unconstitutionally entangling the Board in inquiries about a school's religious beliefs and mission. *Great Falls*, 278 F.3d at 1343 (emphasis omitted). Faculty at religiously affiliated universities are therefore

exempt from the Board's jurisdiction under the NLRA as a matter of constitutional avoidance. *Id.* at 1340-41; *see also Catholic Bishop*, 440 U.S. at 500-01.

In this case, the Board chose to disregard the principles set forth in *Catholic Bishop* and *Great Falls*, as it has done repeatedly since *Catholic Bishop*. It ordered Duquesne to bargain with a union representing part-time, adjunct faculty teaching in all departments of the University's McAnulty College other than the Department of Theology. The Board asserted jurisdiction based on its determination that Duquesne does not hold out McAnulty College's adjunct faculty (other than those in the Department of Theology) as performing a "specific religious function."

The Board adopted its "specific religious function" requirement in *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014), over the vigorous dissents of two of its five members. In so doing, the Board explicitly rejected the three-part test this Court established in *Great Falls*. The Board's *Pacific Lutheran* test, however, merely repackages the prior Board test that *Great Falls* rejected and raises the same constitutional concerns that the Supreme Court and this Court sought to avoid in *Catholic Bishop* and *Great Falls.* The test requires the Board to scrutinize a religiously affiliated university's operations, policies, and practices to determine whether the petitioned-for faculty's role is, in the opinion of a majority of the Board, "sufficiently religious."

It is not only the Board's two dissenting members in *Pacific Lutheran* who agree with Duquesne that the Board's new test is wrong. The Board's own current General Counsel, who now must defend that decision, also concurs. In a case decided shortly after this one, the General Counsel argued that the *Pacific Lutheran* test "fails to adequately respect the religious rights of . . . institutions" and "allows the Board to probe intrusively and unnecessarily into how a university carries out its religious mission." Response to Sur-Reply at 1-2, *Manhattan Coll.*, No. 02-CA-201623 (N.L.R.B. Feb. 21, 2018).[1] He "urge[d] the Board to adopt" the *Great Falls* test, *id.* at 2, but the Board rejected his recommendation. *See Manhattan Coll.*, 366 N.L.R.B. No. 73, 2018 WL 2003450 (2018), *petition for review pending*, Nos. 18-1113 & 18-1158 (D.C. Cir. filed Apr. 27, 2018).[2]

The Board's General Counsel and the dissenting members in *Pacific Lutheran* have it right: the "specific religious function" requirement is contrary to *Catholic Bishop* and *Great Falls*, and this Court should continue to apply its *Great*

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[1] *Available at* https://www.nlrb.gov/case/02-CA-201623 (last visited June 28, 2018).

[2] On June 26, 2018, this Court *sua sponte* ordered the *Manhattan College* case to be held in abeyance pending disposition of the present case and another case that also involves the Board's assertion of jurisdiction over units of faculty at a religiously affiliated university, *Saint Xavier Univ.*, 366 N.L.R.B. No. 31, 2018 WL 1256649 (2018), *petition for review pending*, Nos. 18-1076 & 18-1086 (D.C. Cir. filed Mar. 9, 2018). *See* Order, *Manhattan Coll. v. NLRB*, No. 18-1113 (D.C. Cir. June 26, 2018).

Falls test. But even if the *Pacific Lutheran* test were a permissible way for the Board to determine whether it has jurisdiction, the test was incorrectly applied here—not least because the Board recently declined to exercise jurisdiction over another religiously affiliated college based on materially indistinguishable facts. The Board's Order also violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, because the Order blocks Duquesne's ability to take unilateral actions with respect to its adjunct faculty that it deems necessary to carry out its religious mission.

The Court accordingly should set aside the Board's Order.

ISSUES PRESENTED FOR REVIEW

1. Whether the Board's Order should be vacated because Duquesne satisfies this Court's *Great Falls* test.

2. Whether the Board's *Pacific Lutheran* test contravenes *Catholic Bishop* and this Court's precedents.

3. Whether the Board acted arbitrarily, without substantial evidence, and contrary to law when it exercised jurisdiction over Duquesne under the *Pacific Lutheran* test.

4. Whether the Board's Order violates Duquesne's rights under RFRA.

STATUTES AND REGULATIONS

Pertinent statutes are reprinted in the Addendum.

STATEMENT OF THE CASE

A. Factual Background

Duquesne University of the Holy Spirit. Duquesne was founded in 1878 by priests and brothers of the Spiritans—a Roman Catholic religious congregation. JA370-73 [Er. Ex. 1]; JA672 [Ex. 34 at 1]. The University is listed in the *Official Catholic Directory* and describes itself as "A Catholic University in the Spiritan Tradition." JA70 [Regional Director's Decision at 3]. That tradition focuses on "preach[ing] the Gospel to those who have never heard it, or to those who have barely heard it, with particular attention . . . to young people, and to our educational works." JA297 [Tr. 359].

The University is organized as a nonprofit, membership corporation and is "sustained through a partnership of laity and religious." JA70 [Regional Director's Decision at 3] (quoting University's Mission Statement). Its Articles of Incorporation and Bylaws require all Members of the corporation to be Spiritan priests and brothers. JA70 [*Id.*]. The Members have the "exclusive" authority "to determine or change the mission, the philosophy, objectives, or purpose of the University" and "to issue to the Board . . . a statement of policy concerning the philosophy and mission of the University." JA376-77 [Er. Ex. 2, Amended and Restated Articles of Incorporation, Arts. VII, IX]. The Members also appoint the University's Board of Directors and ratify and confirm the appointment of the

Officers of the University, the Board of Directors, and the University Chaplain. JA386-87 [Er. Ex. 3, Amended and Restated Bylaws of Duquesne University of the Holy Spirit, § 4.1(b), (j)]. The University sets aside an *ex officio* seat with voting rights on its Board of Directors for the Bishop of the Roman Catholic Diocese of Pittsburgh or his designee. *See* JA390 [*Id.* § 6.2].

The University's Religious Mission. Duquesne's Spiritan Members have established a religious mission for the University—to "serve[ ] God by serving students through," among other things, a "[p]rofound concern for moral and spiritual values" and "[s]ervice to the Church." JA70 [Regional Director's Decision at 3]; *see also* JA298 [Tr. 363] (Father James McCloskey, C.S.Sp., Member of the Corporation, testifying that "the religious mission of the university is vitally important, its mission as Catholic and Spiritan, to me, and to [M]embers of the corporation").

Duquesne reinforces the centrality of its mission through many physical reminders on campus. There is a 25-foot tall crucifix at the crossroads of Duquesne's campus, with space for prayer and contemplation. Statues of the Virgin Mary and the saints and other items of religious art and symbols are located throughout the campus, and there are crucifixes in most, if not all, of the classrooms. There is a Chapel where Mass is celebrated daily, as well as on special occasions. JA71 [Regional Director's Decision at 4]; *see also* JA446-55

[Er. Ex. 9] (Spirit & Symbol: A Campus Tour of Religious Art). In addition, more than ten campus buildings and residence halls are named after Spiritan Members. JA71 [Regional Director's Decision at 4]. Indeed, McAnulty College is named for Father Henry Joseph McAnulty, C.S.Sp., a Spiritan priest. JA351 [Tr. 554].

Duquesne disseminates its mission and philosophy through publications "such as its university magazine, its 'Viewbook' sent to prospective students," annual letters to alumni, and other documents publicly available on its website. JA71 [Regional Director's Decision at 4]. The University further emphasizes its mission in orientations, convocations, "Founders Weeks"—which celebrate the Spiritans' community, and service opportunities offered for students and faculty throughout the academic year. JA71, 77 [*Id.* at 4, 10]. In addition, the University operates an Office of Mission and Identity and a Center for the Catholic Intellectual Tradition that specifically promote Duquesne's religious mission to faculty, including adjunct faculty, through forums, presentations, and discussion groups. JA71 [*Id.* at 4]; JA713 [Er. Ex. 57]; JA304-05 [Tr. 390-91].

The Relationship Between the University's Religious Mission and Its Academic Endeavor. As the Regional Director found, Duquesne's mission embodies the Catholic Church's teaching that education is "the work of the Church, even if teaching in secular disciplines" and that "educating students is an expression of service to God." JA71 [Regional Director's Decision at 4]. The

University adheres to specific guidelines the Catholic Church has established for Catholic higher education, including *Ex Corde Ecclesiae* ("From the Heart of the Church"), the Church's *magna carta* for higher education, which was issued by Saint Pope John Paul II and the Application of *Ex Corde Ecclesiae* for the United States, which was promulgated by the U.S. Conference of Catholic Bishops. JA70-71 [*Id.* at 3-4]; *see* JA191-96 [Tr. 45-50]; JA406-26 [Er. Ex. 5]; JA663 [Er. Ex. 32, at 8].

According to *Ex Corde*, a Catholic university must contribute to the work of the Church by uniting two orders of reality that "too frequently tend to be placed in opposition as though they were antithetical"—faith and reason. JA406 [Er. Ex. 5, Introduction]. *Ex Corde* states that it is the

> responsibility of a Catholic University to consecrate itself without reserve to the cause of truth. This is its way of serving at one and the same time both the dignity of man and the good of the Church, which has an intimate conviction that truth is (its) real ally . . . and that knowledge and reason are sure ministers to faith.

JA407 [*Id.* at Introduction § 4] (internal quotation marks omitted).

Consistent with the Church's view that faith and reason are "sure ministers to faith," *Ex Corde* encourages ecumenism, discourages proselytizing, and requires Catholic universities to promote academic freedom and responsibility. *E.g.*, JA202-05 [Tr. 56, 59-60, 67]; JA411, 413 [Er. Ex. 5, Part I, §§ 22, 29]. However, "[a]ll professors are expected to be aware of and committed to the Catholic mission

and identity of their institutions" and to demonstrate "respect for Catholic doctrine." JA433 [Er. Ex. 6, Part 2, art. 4, § 4(a)-(b)]; *accord* JA419 [Er. Ex. 5, Part II, art. 4, § 2].

Thus, in accordance with *Ex Corde*, Duquesne's religious mission seeks to unite academic excellence, moral and spiritual values, and service to the Church in an ecumenical environment. *See* JA648 [Er. Ex. 31, at 5]. *Compare* JA370-73 [Er. Ex. 1], *with* JA406-26 [Er. Ex. 5]. All undergraduates must complete an interdisciplinary "Core Curriculum," JA290 [Tr. 332]—Duquesne's name for its general education requirements—"which uniquely expresses the Spiritan-Catholic identity of Duquesne University," JA693 [Er. Ex. 47, at 1]; *see also* JA294 [Tr. 336] (natural sciences faculty are expected to achieve mission-related learning goals in the Core). The University's Academic Core Founding Document identifies "[g]eneral [g]oals and [s]tudent [l]earning [o]utcomes," including "[e]xplain[ing] how religion can inform personal, societal, and professional life through study of and reflection on theological sources and questions" and "[i]dentify[ing] some of the unique perspectives provided by faith and reason in the pursuit of truth." JA1090-91 [Union Ex. 14, at 1-2]. Adjunct faculty play a significant role in the Core Curriculum, teaching an average of 44 percent of the credit hours. JA72 [Regional Director's Decision at 5]; JA294 [Tr. 336].

The University encourages academic freedom; however, it also links its mission to performance outcomes for all academic programs at the University, which are set forth in *The Dimensions of a Duquesne Education* and which "enable [the University] to document the success of [its] . . . faculty" through its self-assessment process. JA691-92 [Er. Ex. 46];[3] JA285-87 [Tr. 327-29]. These performance outcomes include promoting students' "Ethical, Moral, and Spiritual Development" by helping them to "[r]ecognize the importance of faith and spiritual values" and "[a]pply ethical, moral and spiritual principles in making decisions and interacting with others." JA287-88 [Tr. 329-30]; JA691-92 [Er. Ex. 46]. Because all of Duquesne's faculty deliver courses that are part of academic programs, they are responsible for achieving these outcomes. JA287 [Tr. 329].

The University Expects its Faculty, Including Adjunct Faculty, to Support its Religious Mission. Duquesne views its faculty as "central to the core of who and what" it is as a Catholic and Spiritan university.[4] JA573 [Er. Ex. 20, at

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[3] Page 2 is missing from Er. Ex. 46. The entire document is available at Duquesne University, *The Dimensions of a Duquesne Education*, *available at* http://www.duq.edu/assets/Documents/academic-affairs/_pdf/dimensions-brochure.pdf (last visited June 28, 2018).

[4] At Duquesne, there are many different types of faculty: tenured, tenure track, non-tenure track, executive faculty, emeritus faculty, and adjunct faculty, among others. JA768-70 [Union Ex. 9, at 10-12]. When Duquesne refers generically to "faculty," it is referring to all faculty, including adjuncts, except where the context clearly requires otherwise. *See, e.g.*, JA262-63, 283-84 [Tr. 273-

1]. Indeed, the University's *Faculty Handbook*—one of the documents included in "Getting Started, Adjunct Faculty at Duquesne," an electronic package of key informational materials for new adjunct faculty, JA681-85 [Er. Ex. 38]—defines the "essential role of the faculty" as "implicit in the stated goals and mission of the University," JA768 [Union Ex. 9, at 10]; JA264-65 [Tr. 275-76]. "Without the faculty, the University would be unable to prepare its students intellectually, professionally, aesthetically, spiritually, or ethically for the ordinary responsibilities of life and for leadership in a free, complex, and changing society." JA768 [Union Ex. 9, at 10]; JA264-65 [Tr. 275-76].

For that reason, Duquesne's policy is to hire only faculty who are willing to support its religious mission. The first goal of the University's strategic plan reads: "1.1 Commitment to the mission will be a factor in hiring. . . . A candidate's understanding of and willingness to contribute to the mission will be a part of the hiring process." JA569 [Er. Ex. 18, at 2]. Duquesne's Human Resources website also states that "[a]pplicants must be willing to contribute actively to the mission and to respect the Spiritan Catholic identity of Duquesne." JA672 [Er. Ex. 34, at 1]. In addition, its faculty recruitment brochure states that

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74, 315-16]; JA462 [Er. Ex. 11, Code of Student Rights, Responsibilities and Conduct 2014-2015, at 5] (defining "faculty member" as "any person hired by the University to conduct instructional activities").

"[o]ur employees contribute to our vision of enhancing our culture of academic excellence dedicated to our mission of serving God by serving students." JA670-71 [Er. Ex. 33]. As the University's Provost explained, the "Spiritan Catholic education that we deliver, is entrusted to our faculty. The task of representing our values, and our priorities, is something that our faculty convey to our students, and we must be satisfied in employing a faculty member that she or he is able to fulfill that responsibility." JA241 [Tr. 252].

Department chairs are primarily responsible for hiring adjunct faculty. JA72 [Regional Director's Decision at 5]. The University's expectation is that "the mission statement . . . will play a role in the hiring process." JA248 [Tr. 259]. If the University advertises for an adjunct faculty position, it self-identifies Duquesne as a Catholic, Spiritan university. JA72 [Regional Director's Decision at 5]. The application form for adjuncts specifically requires applicants to describe how they "would support and contribute to the University Mission." JA676-79 [Er. Ex. 36] (faculty and staff employment application). Although the application form is not required and is not always used, the University directs department chairs responsible for hiring adjuncts to ask applicants "to remark on how they see themselves relating to the mission of the university." JA248-52 [Tr. 259-63]. Department chairs are instructed that "the university is not able to hire anybody

who is unable to support the mission" and that includes "adjunct professors as well." JA252-53 [Tr. 263-64].

Once adjunct faculty are hired, the University seeks to educate them about its religious mission. JA253-56 [Tr. 264-67]; JA681-85 [Er. Ex. 38]. This starts with the electronic information package posted on Duquesne's internal website, captioned "Getting Started, Adjunct Faculty at Duquesne," JA681-85 [Er. Ex. 38], which, as Provost Timothy Austin testified, "contains information that we believe adjunct faculty should consult and consider as they move into their new roles at the University," JA253 [Tr. 264]. The linked documents in this package, including Provost Austin's "Welcome" message and a statement of "Duquesne's Mission and Identity," could not be clearer about the University's expectations that adjunct faculty will contribute to its religious mission.

The University also encourages (although it does not require) adjunct faculty to attend orientation sessions, which include a presentation devoted to the University's religious mission and the faculty's role in carrying it out. JA258-61 [Tr. 269-72]; JA687 [Er. Ex. 41] (letter from Provost Austin encouraging attendance). At a typical orientation session, adjuncts have received a pocket-card titled "Faculty and Staff Expectations," which includes the expectation that adjunct faculty "[a]ccept and commit to the values expressed in the mission statement" and "strive to incorporate [Spiritan values] into [their] daily work." JA696 [Er. Ex. 53,

at 1]; JA708 [Er. Ex. 55, at 2] (article distributed at adjunct faculty orientation explaining that "at a Catholic university, Catholic intellectual traditions will affect all aspects of the curriculum").

The University also informs adjunct faculty about opportunities to learn about and engage with the University's religious mission, both at the orientation and afterwards. *See, e.g.*, JA312-14 [Tr. 410-12] (adjunct faculty are eligible to receive "Part-time Faculty Mission Micro-Grant[s]" from the Center for Catholic Faith and Culture and the Office of the Provost to support endeavors that further the University's Catholic, Spiritan mission); JA720-24 [Er. Ex. 62] (Part-Time Faculty Mission Micro-Grant); JA307-09 [Tr. 405-07]; JA714-19 [Er. Ex. 60] (invitation to program on Catholic art).

The University's religious mission also affects the terms and conditions of adjunct faculty employment. *See* JA261-62, 273-74 [Tr. 272-73, 295-96]. The *Faculty Handbook*, which applies to adjunct faculty, *see* JA263 [Tr. 274]; JA681-85 [Er. Ex. 38], states that "we subscribe to the teachings of the Roman Catholic Church," JA760 [Union Ex. 9, at 2]; JA262-63 [Tr. 273-74]. The *Faculty Handbook* confers academic freedom in the classroom on adjunct faculty but also cautions that the "teacher should respect the religious and ecumenical orientation of the University." JA770 [Union Ex. 9, at 12]; *accord* JA433 [Er. Ex. 6, Part 2, art. IV, § 4(b)]. The University's Executive Resolutions confirm that academic

freedom is "subject to the principles and values expressed in the Duquesne University Mission Statement." JA742 [Union Ex. 6, Executive Resolutions of the Board § V.B] (defining academic freedom in teaching). Similarly, research proposals "must be consistent with the goals and objectives of the [U]niversity." JA273-74 [Tr. 295-96]; JA688-89 [Er. Ex. 42] (The Administrative Policy No. 44).

Finally, adjunct faculty are employed for one semester at a time. If an adjunct faculty member is found to be hostile to the University's religious mission, her contract will not be renewed. JA74 [Regional Director's Decision at 7] (acknowledging that adjunct faculty may "not be [openly] 'hostile'" to the University's religious mission); JA228 [Tr. 125] (testimony of University's President that if an adjunct faculty member mocked the University's mission "seriously, to try to undermine what we stand for," this "would be grounds for not renewing an adjunct"); *see also* JA776 [Union Ex. 9, at 19 n.2] (*Faculty Handbook* provides that University may terminate even tenured faculty for "Serious Misconduct," including "failure to observe the principles of the Mission Statement").

In sum, at Duquesne, "[o]utstanding teacher-scholars and scientists are hired, rewarded and retained to support the mutual enrichment of faith and reason." JA701 [Er. Ex. 54, at 4] (brochure distributed at adjunct faculty orientation); JA300 [Tr. 372]. As then-University President Dougherty explained in his 2003

Convocation address discussing Duquesne's strategic plan, who the University is at its "core is best illustrated when one faculty member assists one student to grow in knowledge and maturity within a Catholic, Spiritan context." JA511 [Er. Ex. 16, at 1].

B. Procedural Background

The Representation Proceeding. In 2012, the United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC (the Union) petitioned the Board to recognize it as the exclusive collective bargaining agent for a unit of all part-time, adjunct faculty employed in Duquesne's McAnulty College. The University initially entered into a stipulated election agreement but shortly thereafter filed a motion to withdraw, arguing that it is not subject to the Board's jurisdiction under *Catholic Bishop*. JA87 [Request for Review at 3]. The Board's Regional Director denied the University's motion, and the University appealed to the full Board. JA87 [*Id.*]. While Duquesne's appeal was pending, a representation election was held, and a majority of employees in the unit voted for the Union. JA68 [Regional Director's Decision at 1 n.1].

During the pendency of Duquesne's appeal, the Board adopted its *Pacific Lutheran* test. The Board thus remanded Duquesne's case to the Regional Director to determine whether the Board has jurisdiction under *Pacific Lutheran*. The

Regional Director's Hearing Officer conducted a hearing. After post-hearing briefing, the Regional Director concluded that the Board had jurisdiction under the *Pacific Lutheran* test because McAnulty College's adjunct faculty, in the Regional Director's view, do not perform a "specific religious function." JA69 [*Id.* at 2]. As a result, she certified the Union as the exclusive collective bargaining representative for the petitioned-for faculty unit. JA68 [*Id.* at 1]. The Regional Director also rejected the Union's contention that the University was bound by the stipulated election agreement, noting that "statutory jurisdiction . . . may be challenged at any time." JA69 [*Id.* at 2 n.5].

Duquesne filed a request for review with the Board. *See* JA138 [Board Decision on Review and Order at 1]. A divided three-member panel of the Board rejected the request, although the majority did modify the unit to exclude adjunct faculty in the Department of Theology. *See* JA138 [*Id.* at 1 & n.1]. Acting Chairman Miscimarra dissented. In his view, this Court's *Great Falls* test should control, and all adjunct faculty are exempt from the Board's jurisdiction under *Catholic Bishop*. He argued that the majority's distinction between adjuncts who teach "religious" and "secular" courses is forbidden by *Catholic Bishop* because "the 'very process of inquiry' associated with this type of evaluation raises First Amendment concerns." JA140 [*Id.* at 3] (quoting *Catholic Bishop*, 440 U.S. at 502). He also explained that the majority was relying on "a false dichotomy

between 'religious' and 'secular' instruction" because "providing students exposure to diverse viewpoints[ ] . . . is an important aspect of a Catholic education." JA140-41 [*Id.* at 3-4] (internal quotation marks omitted).

The Unfair Labor Practice Proceeding. After it was certified, the Union demanded that the University recognize and bargain collectively with it. JA176-77 [Order at 1-2]. When the University declined, the Board's General Counsel initiated an unfair labor practice proceeding and sought summary judgment from the Board. JA176 [*Id.* at 1]. In response, Duquesne argued that the Board lacked jurisdiction in light of *Catholic Bishop*; that the *Pacific Lutheran* test is unconstitutional, JA176 [*Id.*], and that the Board's assertion of jurisdiction violates RFRA, JA168-70 [Duquesne's Opp'n at 14-16].

A different three-member panel of the Board issued a final Order granting the General Counsel's motion. The Board found that "[a]ll representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding" and therefore that Duquesne had not raised any issue that could properly be litigated at the unfair labor practice stage. JA176 [Order at 1]. The panel concluded on this basis that the Board had jurisdiction over the University, although two of the three panel members declined to "express [an] opinion on the merits of the Board's decision in [the representation] proceeding or on whether *Pacific Lutheran* . . . was correctly decided." JA176 [*Id.* at 1 & n.1].

The panel ruled that Duquesne committed an unfair labor practice when it declined to recognize the Union and ordered the University to cease its unfair labor practice and bargain with the Union. JA177 [*Id.* at 2].

This petition followed and was consolidated with the Board's cross-application for enforcement of its Order.

SUMMARY OF ARGUMENT

This Court's decision in *Great Falls* is controlling here and compels vacatur of the Board's Order. In *Great Falls*, the Court gave thorough consideration to the First Amendment issues raised by the Board's assertion of jurisdiction to compel a religiously affiliated university to bargain with a union representing faculty members, and it established this Circuit's test for determining the Board's jurisdiction in such cases consistently with *Catholic Bishop*. The Court reaffirmed the *Great Falls* test seven years later in *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

There is no dispute that Duquesne satisfies the *Great Falls* test. The Board found that it could exercise jurisdiction over Duquesne only because it applied *Pacific Lutheran*, which expressly rejected *Great Falls* and adopted a test that greatly expands the scope of the Board's jurisdiction over religiously affiliated colleges and universities. The Board took that action even though then-Member Miscimarra, in his *Pacific Lutheran* dissent, warned that the Board's action was

"predestined to futility" because it would inevitably be reviewed and rejected by this Court. 361 N.L.R.B. at 1429 (Miscimarra, Member, dissenting in relevant part). Member Miscimarra was right: this Court's *Great Falls* decision is controlling, and in light of *Great Falls*, the Board's Order in this case cannot stand.

The Board's Order should also be set aside for other reasons. On the merits, the *Pacific Lutheran* test is invalid under the constitutional avoidance principles developed in *Catholic Bishop* and *Great Falls*. It creates the same grave threats to First Amendment interests as the Board's previous efforts to evade those cases, which the courts have consistently rejected. *Pacific Lutheran*'s requirement that a university prove that it "holds out" petitioned-for faculty as serving a "specific religious function" requires the Board to impermissibly attempt to distinguish "religious" from "secular" functions and invites intrusive and often offensive inquiries about the university's mission and even about the personal religious beliefs of university officials, as the record in this case sadly demonstrates. This is precisely the sort of entanglement with religion that *Catholic Bishop* and *Great Falls* instruct the Board to avoid.

The *Pacific Lutheran* test also does nothing to diminish the infringement of Duquesne's First Amendment rights that would result if the Board's Order were enforced. As the Supreme Court recognized in *Catholic Bishop*, because the subjects of mandatory bargaining under the NLRA are broad, collective bargaining

will necessarily force the University to compromise its religious objectives or risk unfair labor practice charges for refusing to bargain or, even worse, a strike. And every time the University takes an adverse employment action against a represented teacher for conduct inconsistent with its mission, the University would be at risk of an unfair labor practice charge alleging that the action was taken because of anti-union animus, which would require Duquesne to defend its religious principles before the Board. This is true regardless of whether a majority of the Board believes that the petitioned-for faculty members do not perform a "specific religious function."

It is no wonder that Board Members Miscimarra and Johnson strongly dissented from *Pacific Lutheran*, that the current General Counsel has disavowed the *Pacific Lutheran* test, and that two of the three Board members who upheld the Regional Director's bargaining order in this very case were unwilling to express any view on whether this case was correctly decided.

In any event, the *Pacific Lutheran* test was misapplied here. By its terms, *Pacific Lutheran*'s "holding out" requirement obliged the Regional Director to restrict herself to considering Duquesne's public documents and statements, which prove that the University holds out all of its faculty, including adjuncts, as critical to its Catholic, Spiritan mission. Instead, the Regional Director found this evidence insufficient because the University did not show that it has *actually*

terminated faculty for conduct inconsistent with its mission. That conclusion not only misconstrues *Pacific Lutheran* and engages in precisely the mode of analysis that *Pacific Lutheran* claimed the Board would not pursue, but it is also flatly inconsistent with another recent Board decision, in which a Regional Director declined to exercise jurisdiction over a religiously affiliated college on virtually identical facts.

Finally, the Board's Order should be vacated because it violates Duquesne's rights under RFRA. If the Order is enforced, the coercive pressures inherent in collective bargaining under NLRB auspices will substantially burden Duquesne's ability to pursue its religious mission, and the Board has no claim to a compelling interest in imposing such a burden.

STANDING

Duquesne is a "person aggrieved by a final order of the Board" determining that Duquesne committed an unfair labor practice. 29 U.S.C. § 160(f). The University's Article III "standing to seek review of [the Board's] administrative action is self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002).

The University has standing to bring its RFRA claim because it contends that the Board's Order, if enforced, will substantially burden its religious exercise. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1176-77 (D.C. Cir. 2012) (plaintiff's

claim that policies and procedures would injure him on basis of religious belief sufficient to confer standing); 42 U.S.C. § 2000bb-1(c) (standing under RFRA is "governed by the general rules of standing under article III").

STANDARD OF REVIEW

The Board's jurisdiction is a question of law that this Court reviews *de novo.* The Board's interpretation and application of *Catholic Bishop* receives no deference from this Court. As *Great Falls* put it, "the constitutional avoidance canon of statutory interpretation" applied by the Supreme Court in *Catholic Bishop* "trumps *Chevron* deference." 278 F.3d at 1340-41. This Court is "governed by the Supreme Court's decision in *Catholic Bishop*, as [it] read[s] it, not as it is read by the Board." *Id.* at 1341; *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (Board entitled to no deference where its construction of NLRA "poses serious questions of the validity of [the statute] under the First Amendment").

The Board's factual findings must be "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). The standards applicable to Duquesne's RFRA claim are discussed in Part IV, *infra*.

ARGUMENT

The Board's approach to whether it has jurisdiction in this case, including its reliance on the test it announced in *Pacific Lutheran*, is fundamentally inconsistent

with the Supreme Court's ruling in *Catholic Bishop* and this Court's decisions in *Great Falls* and *Carroll College*. To fully appreciate the errors in the Board's approach, however, it is important to understand the Board's repeated efforts over the past nearly forty years to expand its jurisdiction to reach the faculties of religiously affiliated schools and the court decisions that have consistently rejected these efforts on constitutional avoidance grounds.

In *Catholic Bishop*, the Supreme Court rejected the Board's proposed line between church-operated schools that are "completely religious" and those that are merely "religiously associated," on the ground that the distinction raised serious First Amendment concerns. 440 U.S. at 499. The Board has strained against *Catholic Bishop* ever since. First, it attempted to exercise jurisdiction over teachers at religiously affiliated schools that were not formally "church-operated." The Second Circuit rebuffed that attempt in *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 821, 823 (2d Cir. 1980). The Board then tried a different tack, seeking to limit *Catholic Bishop* to secondary schools and to exercise jurisdiction over lay faculty at a religiously affiliated college. The First Circuit declined to enforce the Board's order by an equally divided *en banc* court in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985). In that case, then-Judge Breyer explained that the First Amendment problems that *Catholic Bishop* sought to avoid are "present . . . in full force" in the higher

education context. *See id*. at 401-02. Judge Breyer cautioned that "we cannot avoid entanglement by creating new, finely spun judicial distinctions." *Id.* at 402.

Undeterred, the Board next adopted a "substantial religious character" test in an effort to limit which colleges and universities qualify for exemption under *Catholic Bishop*. In *Great Falls*, this Court rejected that test because it created the same First Amendment concerns that *Catholic Bishop* sought to avoid. 278 F.3d at 1341, 1345. And when the Board continued to apply the invalid "substantial religious character" test despite *Great Falls*, the Court in *Carroll College* reaffirmed that the *Great Falls* test controls in this Circuit and held that the Board's recognition of a faculty union in that case was "patently beyond the NLRB's jurisdiction." 558 F.3d at 574.

Nevertheless, in *Pacific Lutheran*, the Board, in a 3-2 decision, refused to adopt the *Great Falls* test and announced yet another new interpretation of *Catholic Bishop*. The Board's new test borrows the first prong of the *Great Falls* test—a university "must hold itself out as providing a religious educational environment"—but crafts a new second prong that requires a university to show that its faculty are "held out as performing a *specific religious function*," as demonstrated by the university's "representations to current or potential students and faculty members, and the community at large." *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1409, 1411, 1414 (emphasis in original).

The Board applied the *Pacific Lutheran* test in this case to assert jurisdiction over most of the petitioned-for faculty. As explained below, the Board's Order should be vacated because this Court's *Great Falls* test is controlling and because the *Pacific Lutheran* test is irreconcilable with *Catholic Bishop* and this Court's precedents.

I. THE BOARD'S ORDER SHOULD BE VACATED BECAUSE DUQUESNE CLEARLY SATISFIES THIS COURT'S CONTROLLING *GREAT FALLS* TEST.

The Board's Order should be vacated for the simple reason that the Board has no jurisdiction under this Court's controlling precedents. Under *Great Falls* and *Carroll College*, the Board has no jurisdiction over a petitioned-for faculty unit when the university (1) "holds itself out to the public as a religious institution"; (2) "is non-profit"; and (3) "is religiously affiliated." *Great Falls*, 278 F.3d at 1347; *see also Carroll Coll.*, 558 F.3d at 572. If a university meets this "bright-line test," its faculty are "patently beyond the NLRB's jurisdiction," *Carroll Coll.*, 558 F.3d at 574, and "the Board must decline to exercise jurisdiction," *Great Falls*, 278 F.3d at 1347.

There can be no dispute that Duquesne satisfies the *Great Falls* test. As the Regional Director found, the University holds itself out as providing a religious educational environment; it is organized as a nonprofit, membership corporation;

and it is affiliated with the Spiritans and the Catholic Church. *See* JA69-70 [Regional Director's Decision at 2-3]; *supra* pp. 7-12.

Nor is there any reason for this Court to revisit the *Great Falls* test. Since the test was reaffirmed in *Carroll College*, no decision of the Supreme Court or this Court has altered the scope of the *Catholic Bishop* exemption. The Board majority in *Pacific Lutheran* claimed that the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), supported its new test, 361 N.L.R.B. at 1413-14, but *Hosanna-Tabor* involved a completely different issue—whether the plaintiff's employment discrimination claim was barred by a "ministerial exception"—and said nothing about the jurisdiction of the Board under the NLRA. *See Pac. Lutheran Univ.*, 361 N.L.R.B. at 1434 n.7 (Johnson, Member, dissenting). Contrary to the Board majority's suggestion, the Court in *Hosanna-Tabor* did not endorse a test requiring an intrusive inquiry into the *bona fides* of a religious institution's claim that the plaintiff was a "minister." Rather, the Court expressly refrained from adopting a governing test, 565 U.S. at 190, and summarized the facts simply to demonstrate that whether the plaintiff in *Hosanna-Tabor* should be considered a "minister" was not a close case, *id*. at 191-92. Indeed, the Court criticized the Sixth Circuit for placing "too much emphasis" on the fact that the plaintiff performed extensive "secular duties." *Id*. at 193.

This Court's decisions in *Great Falls* and *Carroll College* are completely consistent with the principles announced in *Hosanna-Tabor*. Moreover, when this Court decided *Great Falls*, it had already adopted a similar approach to the ministerial exception that the Supreme Court embraced in *Hosanna-Tabor*. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). Thus, nothing in *Hosanna-Tabor* alters or affects this Court's settled jurisprudence limiting the jurisdiction of the Board on constitutional avoidance grounds.

Because Duquesne plainly satisfies the controlling *Great Falls* test, the Court should vacate the Board's order. The Court need not even address the Board's deeply flawed *Pacific Lutheran* test or its application of that test here.

II. THE BOARD'S *PACIFIC LUTHERAN* TEST IS IRRECONCILABLE WITH *CATHOLIC BISHOP* AND *GREAT FALLS*.

The Board's *Pacific Lutheran* test is also invalid on the merits. Its second prong—which requires the Board to decide whether a university holds out its faculty as performing a "specific religious function"—is incompatible with the constitutional avoidance holdings of *Catholic Bishop* and this Court's precedents.

In *Catholic Bishop*, the Supreme Court recognized that teachers in a religious school have a special function, one that presents "the danger that religious doctrine will become intertwined with secular instruction." 440 U.S. at 501 (quoting *Meek v. Pittenger*, 421 U.S. 349, 370 (1975)). If the Board were to exercise jurisdiction over such teachers, the Court explained, the resolution of

unfair labor practice charges would, in many cases, "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. In addition, the Board's inquiry with respect to mandatory subjects of bargaining would "implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions" and "give[ ] rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.* at 503 (internal quotation marks omitted). The Court observed that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502. For that reason, the Court "decline[d] to construe the [NLRA] in a manner that could . . . call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

Applying *Catholic Bishop*, this Court has twice rejected the Board's previous "substantial religious character" test for determining when a religiously affiliated university must bargain with faculty. The Court reasoned that "the very inquiry by the NLRB into the University's religious character" allows the Board to "troll[ ] through the beliefs of the University[ ] [and] mak[e] determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the

University." *Great Falls*, 278 F.3d at 1340-42. "[R]equir[ing] an explanation of beliefs and how they are compatible with other aspects of life at the University is to tread upon that which the First Amendment protects." *Id.* at 1344. The same thing can be said for "requir[ing] proof of 'actual religious influence or control'" because it impermissibly "question[s] the sincerity of the school's public representations about the significance of its religious affiliation." *Carroll Coll.*, 558 F.3d at 573.

By contrast, the bright-line *Great Falls* test "avoids the constitutional infirmities" of the "substantial religious character" test. *Great Falls*, 278 F.3d at 1344. For one thing, it prevents courts and the Board from having to "decid[e] which activities of a religious organization [are] religious and which [are] secular." *Id.* at 1342. After all, the Court explained, the fact "[t]hat a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious." *Id.* at 1346. For another thing, the *Great Falls* test avoids the "danger" that the Board might "minimize the legitimacy of the beliefs expressed by a religious entity" in order to assert jurisdiction. *Id.* at 1345. Furthermore, the *Catholic Bishop* exemption cannot be limited "to religious institutions with hard-nosed proselytizing" or those that "have no academic freedom." *Id.* at 1346. Just because a university "is ecumenical and open-minded . . . does not make it any less religious, nor NLRB

interference any less a potential infringement of religious liberty." *Id*. The Court's bright-line test also has the salutary effect of not "coercing an educational institution into altering its religious mission to meet regulatory demands." *Id.* at 1345.

Although the Board claims to have crafted a new test in *Pacific Lutheran*, its "specific religious function" requirement is really just a repackaged version of the "substantial religious character" inquiry rejected in *Great Falls* and *Carroll College*. Just as the Board once sought to justify its "substantial religious character" test as a proper assertion of broad jurisdiction, *Carroll Coll.*, 558 F.3d at 574 n.3, the Board's new test seeks to assert jurisdiction "to the extent constitutionally permissible," *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1408. In concededly reaching to expand Board jurisdiction to the maximum constitutionally permissible, both tests disregard the constitutional avoidance principles set forth in *Catholic Bishop* and push past the governing constitutional limits. *See also id.* at 1431-33 (Johnson, Member, dissenting) (explaining that the Board erred in attempting to balance the NLRA with the Constitution).

And just as the Board's rejected "substantial religious character" test ultimately required the Board to decide whether a university was "sufficiently religious" to merit the *Catholic Bishop* exemption, the Board's "new" test similarly requires it to decide whether the role of the petitioned-for faculty is "sufficiently

religious." In fact, a key component of the Board's "substantial religious character" test involved an assessment of "the role of the unit employees in effectuating [the university's] purpose" and "whether religious criteria are used for the appointment and evaluation of faculty," *Great Falls*, 278 F.3d at 1339 (internal quotation marks omitted)—the same considerations the Board now seeks to apply under its "new" test. *Pacific Lutheran* is merely old wine in a new bottle.

Not surprisingly, then, the Board's *Pacific Lutheran* test, like the "substantial religious character" test at issue in *Great Falls*, "creates the same constitutional concerns that led to the Supreme Court's decision in *Catholic Bishop*," *id.* at 1341, and is foreclosed by *Catholic Bishop* and this Court's precedents. *See Pac. Lutheran Univ.*, 361 N.L.R.B. at 1429 (Miscimarra, Member, dissenting in relevant part) (majority's "standards entail an inquiry likely to produce an unacceptable risk of conflict with the Religion Clauses of the First Amendment"); *id.* at 1433 (Johnson, Member, dissenting) ("[T]he standard's second prong . . . not only fails to avoid the First Amendment questions, it plows right into them at full tilt.").

A. The Board's "Specific Religious Function" Inquiry Requires The Board To Draw Impermissible Distinctions Between "Religious" And "Secular" Activities.

The Board's inquiry into whether the petitioned-for faculty members perform a "specific religious function" reintroduces the same serious problems of

religious entanglement that the Supreme Court and this Court have repeatedly sought to avoid. Just as courts and the Board should not be in the business of "deciding which activities of a religious organization [are] religious and which [are] secular," *Great Falls*, 278 F.3d at 1342 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987)), determining which faculty perform a "specific religious function" requires the Board to engage in impermissible line-drawing and scrutiny of a religiously affiliated university's religious beliefs and mission. *See Amos*, 483 U.S. at 336 ("The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.").[5] As then-Judge Breyer explained in *Bayamon*, the courts cannot approve a standard requiring fine "distinctions that will themselves require further court or Labor Board 'entanglement' as they are administered." 793 F.2d at 402. The same goes for the Board. The Board cannot constitutionally determine itself

[5] *See also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014) (observing that analysis of whether legislative prayers were nonsectarian "would involve government in religious matters to a far greater degree"); *Mitchell v. Helms*, 530 U.S 793, 828 (2000) (plurality opinion) (concluding that inquiry into "whether a school is pervasively sectarian is not only unnecessary but also offensive"); *Hernandez v. Comm'r*, 490 U.S. 680, 694 (1989) (rejecting proposal that "would force the IRS and the judiciary into differentiating 'religious' services from 'secular' ones"); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (Litigation "about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . .").

what is or is not a "specific religious function" performed by the faculty of Duquesne.

Indeed, this Court in *Great Falls* has already rejected the kind of analysis that the Board majority in *Pacific Lutheran* required. According to the *Pacific Lutheran* majority, "a university's commitment to diversity and academic freedom" *undercuts* "a finding that faculty members are held out as performing" a specific religious function. *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1411-12. Rather, the majority held, the Board will only decline jurisdiction if the faculty have duties "such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training." *Id.* at 1412. But *Great Falls* rejected such a cramped conception of what constitutes a religious function. As discussed above, Catholic teachings make clear that teaching secular subjects *also* serves a religious function. And in *Great Falls*, the Court recognized that even if a university gives its faculty "academic freedom," "that does not make [the school] any less religious, nor NLRB interference any less a potential infringement of religious liberty." 278 F.3d at 1346. For this reason alone, the *Pacific Lutheran* test is invalid.

The Board also emphasized that its new inquiry turns on whether a university "holds out" the petitioned-for faculty as performing a "specific religious

function," *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1411, but this does nothing to cure the entanglement problem because the Board *reserves to itself* the decision whether the university's statements about the faculty's role amount to a "specific religious function." To make that determination, the Board inevitably must "troll[ ] through the beliefs of the University[ ] [and] mak[e] determinations about its religious mission"—"the sort of intrusive inquiry that *Catholic Bishop* sought to avoid." *Great Falls*, 278 F.3d at 1341-42; *see also Pac. Lutheran Univ.*, 361 N.L.R.B. at 1434 (Johnson, Member, dissenting) (*Pacific Lutheran*'s second prong puts "the Board in the untenable position of deciding what can, and what cannot, be deemed a sufficiently religious role or a sufficiently religious function.").

The record in this case proves the point. There can be no doubt that Duquesne *holds out* its faculty as performing an essential role in carrying out its Catholic, Spiritan mission. As explained above, *see supra* pp. 15-16, the University's "Faculty and Staff Expectations" card distributed at orientation states that faculty are expected to "[w]ork towards understanding the Spiritan values expressed in the mission statement and strive to incorporate them into [their] daily work." JA696 [Er. Ex. 53]; *see* JA299 [Tr. 371]. The University's *Faculty Handbook* defines academic freedom as "subject to the principles and values expressed in the Duquesne University Mission Statement" and requires faculty to "respect the religious and ecumenical orientation of the University." JA742

[Union Ex. 6, § V.B]; JA770 [Union Ex. 9, at 12]. The University invites and encourages its adjunct faculty to embrace its Catholic, Spiritan mission in their courses, regardless of the subjects they teach. In assessing its own performance, the University looks at faculty performance outcomes on key issues, including promoting students' ethical, moral and spiritual development. *See The Dimensions of a Duquesne Education*, *supra*; JA265 [Tr. 276]; JA270 [Tr. 281]. And adjunct faculty teach nearly 50% of the University's "Core Curriculum," JA294 [Tr. 336], which "uniquely expresses the Spiritan-Catholic identity of Duquesne University," JA693 [Er. Ex. 47, at 1] (Core Curriculum website).

Yet the Regional Director's inquiry under *Pacific Lutheran* led her to a contrary conclusion. In determining whether the petitioned-for faculty perform a "specific religious function," *Pacific Lutheran* made clear that she could not rely on "[g]eneralized statements that faculty members are expected to . . . support the goals or mission of the [U]niversity." 361 N.L.R.B. at 1411. Instead, the Regional Director had to determine whether faculty "are required to serve a religious function, such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training." *Id.* at 1412. Thus, she was forced to ask, among other things, whether the petitioned-for faculty "incorporate[d] any

element of Catholicism into [their] teaching or [their] evaluation of . . . students." JA73, 78 [Regional Director's Decision at 6, 11].

Moreover, the Regional Director's Hearing Officer, delegated to assist her inquiry, allowed precisely the types of intrusive and entangling questions that have repeatedly troubled courts. *See Catholic Bishop*, 440 U.S. 490, App'x (questioning related to liturgies); *Great Falls*, 278 F.3d at 1343 (expressing concerns about "question[ing] . . . the nature of the University's religious beliefs and how the University's religious mission was implemented" and about the fact that "the president was required to justify the method in which the University teaches gospel values, and to respond to doubts that it was legitimately 'Catholic'"). For example, in the hearing in this case, the Union was permitted to ask the University's President whether he agreed with Pope Francis's "recognizing this Italian Union of Educators." JA229 [Tr. 171]. The Union also asked the Director of the Center for the Catholic Intellectual Tradition how an atheist teacher teaching a class on planets could contribute to the University's Catholic, Spiritan mission. JA315-16 [Tr. 429-30]. In addition, an Associate Provost was asked to explain how the University defined "ecumenical" in its mission statement and to identify her own faith. JA295-96 [Tr. 353-54]. And a Spiritan priest and Member of the corporation was asked whether he agreed with the Associate Provost's answer,

JA303 [Tr. 378], and to explain his "understanding as to whether evangelization means converting non-Catholic students to Catholicism," JA301-02 [Tr. 376-77].

These lines of inquiry are inherent in the Board's "specific religious function" requirement. They raise the same serious constitutional questions that caused this Court and other courts to reject the Board's prior interpretations of *Catholic Bishop*. *See Bayamon*, 793 F.2d at 402 ("to promise that courts in the future will control the Board's efforts to examine religious matters, is to tread the path that *Catholic Bishop* forecloses").

B. The Board's Test Does Nothing To Prevent Improper Entanglement Once The Board Exercises Jurisdiction.

Even if the Board could somehow define what a "specific religious function" is without impermissible religious entanglement, its exercise of jurisdiction over faculty at religiously affiliated universities will create other First Amendment conflicts that *Catholic Bishop* sought to avoid. The Board's test assumes that if the petitioned-for faculty do not perform what it considers to be a "specific religious function," then there is no risk that a university's religious mission will be implicated in collective bargaining and adverse employment actions. That is wrong and disregards the concerns expressed by the Supreme Court in *Catholic Bishop* about likely religious entanglement during mandatory bargaining and in the Board's resolution of unfair labor practice charges. 440 U.S. at 502-03. In reality, if the Board's Order is enforced, the Board and the courts will inevitably be drawn

into policing Duquesne's religious mission as it interacts with its adjunct faculty and with the Union that seeks to represent them.

First, impermissible issues will inevitably arise in the process of collective bargaining. The NLRA obligates an employer to bargain about "mandatory subjects of bargaining," which encompass all "terms and conditions of employment." *Catholic Bishop*, 440 U.S. at 502-03; *see also* 29 U.S.C. § 158(d). An employer's refusal to bargain about mandatory subjects is a *per se* violation of Section 8(a)(5) of the Act, regardless of the employer's good faith. 29 U.S.C. § 158(a)(1), (a)(5); *NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.").

In the context of a university, mandatory subjects of bargaining are likely to "include the whole of school life." *Bayamon*, 793 F.2d at 402; *see also Catholic Bishop*, 440 U.S. at 503. Mandatory bargaining subjects may include everything from wages and hours to hiring, discipline, and termination criteria; the faculty evaluation process; eligibility for research grants; and even dress codes. Because these topics will often directly relate to a religiously affiliated university's ability to carry out its mission, bargaining conflicts are inevitable. Indeed, even changing

curriculum to include religious requirements may be altering "'conditions of employment' that are 'mandatory subjects of bargaining.'" *Bayamon*, 793 F.2d at 402.

Issues that put a university's religious mission at odds with its obligation to bargain could arise in a host of other situations. For example, in this case, the Regional Director ignored Duquesne's strategic plans and its training for department chair hiring—which call for the University's religious mission to be a factor in adjunct faculty hiring—because there was "no evidence in the record . . . as to how the hiring is actually accomplished." JA72 [Regional Director's Decision at 5]. But if Duquesne now decides to require faculty to sign a pledge that they will incorporate its religious mission into their course work or if it requires course syllabi to include mission-related elements, the University will be subject to unfair labor practice charges unless it is willing to bargain about these matters of religious principle.

Similarly, the Regional Director discounted evidence that Duquesne invites adjunct faculty to orientations where information is given about their role in furthering the University's religious mission because the orientations are not mandatory. JA72 [*Id.*]. But going forward, an unfair labor practice charge could be filed if Duquesne's Spiritan Members decide to direct the Board of Directors to

require all faculty to attend an orientation on the University's religious mission and their role in carrying it out.

It is no answer to say that the University has only the obligation to bargain about mandatory topics, not the obligation to reach agreement. As *Katz* long ago made clear, a refusal to bargain about mandatory topics is a *per se* violation of the NLRA. 369 U.S. at 743. But Duquesne's religious mission and its decisions on how its faculty should carry out that mission are not negotiable under the First Amendment, and the Board cannot make them so.

What is more, the Board fails to consider that, in addition to unfair labor practice charges, Union negotiators could insist that Duquesne capitulate on mission-related issues or face a strike, picketing, protest, or other labor action. Or the Union could take the position that it will only accede to the University's position on these issues if the University compromises on other issues such as wages and benefits. Neither Duquesne nor any other religiously affiliated university should be forced to make such choices.

Second, wholly apart from collective bargaining, impermissible issues could easily arise as a result of adverse employment actions. Any time a university takes disciplinary action against a represented employee for conduct contrary to the university's religious mission, it risks an unfair labor practice charge in which the union alleges that it acted based on anti-union animus. *See, e.g.*, *Bayamon*, 793

F.2d at 401 ("The teacher, for example, might claim that rules, regulations, promotions, hirings, and firings reflected an 'anti-union animus,' while the administrators might claim their actions were based upon religious reasons."). In such cases, the Board and the courts will necessarily be called upon to adjudicate the good faith of the university's religious justifications for the challenged employment action.

The same kinds of issues could also easily arise from actions taken by a religiously affiliated university to further its religious mission. Under *Pacific Lutheran*, the Board will assert jurisdiction where a university imposes merely a general requirement that faculty respect or support the university's religious mission. 361 N.L.R.B. at 1411. But the Board failed to consider the entanglement issues that would arise if the university took steps to enforce that general requirement. The Board may not adjudicate a university's enforcement of a general requirement that a faculty member support its religious mission because it would require the Board to second-guess whether the university acted in the good faith pursuit of its religious mission and, even if it did, whether it acted consistent with its bargaining obligations under the NLRA.

Similarly, the Board asserted jurisdiction over Duquesne despite the Regional Director's finding that Duquesne forbids adjunct faculty from being "hostile" to its religious mission. JA74 [Regional Director's Decision at 7]; JA228

[Tr. 125]; JA776 [Union Ex. 9, at 19 n.2]. In other words, Duquesne draws a line based on its religious mission that adjunct faculty may not cross. The Board asserted jurisdiction, apparently because the University did not provide examples of where it has policed that line. But that is beside the point (not to mention irrelevant under *Pacific Lutheran*'s supposedly "limited" "holding out" requirement, 361 N.L.R.B. at 1411-12). The University's enforcement of that line could result in unfair labor practice charges that would entail severe risk of unconstitutional entanglement.

Finally, the Board's exercise of jurisdiction also ignores the unique role of faculty as teachers. Even if a faculty member is determined to keep the religious mission out of the classroom, students—many of whom choose a religiously affiliated university for a reason—may raise the issue in class for them. For example, a faculty member teaching a course on evolution at a Christian university might be asked by a student how evolution is consistent with the Biblical account of creation. *See Catholic Bishop*, 440 U.S. at 501 (warning about "the danger that religious doctrine will become intertwined with secular instruction" (quoting *Meek*, 421 U.S. at 370)). The faculty member's response could implicate sensitive matters related to the university's mission, its definition of academic freedom, and any requirement that the faculty member support the university's religious mission. And any adverse employment action and unfair labor practice charge based on the

faculty member's response would require the Board to inquire into and ultimately decide whether the university acted in good faith based on its religious mission. *Cf. Bayamon*, 793 F.2d at 401 ("[R]eviewing such sanctions would place the Board squarely in the position of determining what is 'good faith' Dominican practice in respect to such counseling.").

C. The Board's Test Impermissibly Minimizes The Legitimacy Of A University's Religious Beliefs.

In *Great Falls*, this Court warned that "[o]ne danger of the NLRB's 'substantial religious character' approach, is that when the Board seeks to assert jurisdiction, it may minimize the legitimacy of the beliefs expressed by a religious entity." 278 F.3d at 1345. The Board's *Pacific Lutheran* test does exactly that, as the record here shows. Duquesne put forth substantial evidence that it holds out its adjunct faculty as playing an integral role in carrying out its religious mission. *See supra* pp. 8-18. Yet, in a page-and-a-half long decision that contains virtually no analysis, the Board effectively concluded that the University separates faith and reason because its religious mission, according to the Board, is relevant only to the Department of Theology. The Board's decision represents an official pronouncement by the Federal Government that the role played by Duquesne's adjunct faculty—other than those in the Department of Theology—does not fulfill any religious mission and is no different from the role "they would be expected to fill at virtually all universities." 361 N.L.R.B. at 1412; *see* JA138-141 [Board

Decision on Review and Order]. The line the Board drew could not be more contrary to what the University and its Spiritan founders and Members seek to accomplish.

* * *

In sum, the Board's *Pacific Lutheran* test cannot coexist with *Great Falls* and *Carroll College*, and the Board's application of that test here reinforces the wisdom of the Court's *Great Falls* test. As Member Johnson explained in his *Pacific Lutheran* dissent:

> At the end of the day, my colleagues' formulation and application of their new test proves only one thing: If a secular government agency (1) mistakenly puts its own statute on the same footing as the Religion Clauses of the First Amendment, (2) fails to understand that it cannot evaluate the religiosity of a belief, (3) fails to understand that the existence of a parallel secular justification does not cancel out the religiosity of a religious belief, and (4) ultimately doesn't understand how religions work in a[ ] university-educational environment, that agency will find that its statute *almost always* gives itself jurisdiction over faculty at religious institutions, with the effective power to ultimately regulate their instructional practices. But four wrongs don't make a right, and I predict the courts will have to, once again, reintroduce the Board to the doctrine of constitutional avoidance.

361 N.L.R.B. at 1441 (emphasis in original). That time has come. The Board's *Pacific Lutheran* test should be rejected, and the Court should apply its *Great Falls* test and vacate the Board's Order.

III. EVEN UNDER THE *PACIFIC LUTHERAN* TEST, THE BOARD LACKS JURISDICTION OVER DUQUESNE.

Even under the Board's own flawed test, the Regional Director either

ignored or discounted clear record evidence contradicting her conclusions. Instead of applying *Pacific Lutheran*'s "holding out" requirement, she held the University to a "demanding" standard under the second prong of the *Pacific Lutheran* test. JA76 [Regional Director's Decision at 9]. The Board, in turn, rejected the University's request for review, without offering any analysis of the relevant evidence. JA138-139 [Board Decision on Review and Order at 1-2 & n.1]. Had the Board properly applied its own test and considered the relevant evidence, the Board would have had no choice but to conclude that it did not have jurisdiction over Duquesne.

In *Pacific Lutheran*, the Board explained that the second prong of its new test "focuses on whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the college or university's religious mission." 361 N.L.R.B. at 1412. A university need only demonstrate "a *connection* between the performance of a religious role and faculty members' employment requirements" or "job duties." *Id.* at 1412 n.14 (emphasis in original). So, for example, the Board will consider whether faculty members "are hired[ ] [and] fired[ ] . . . under criteria that . . . implicate religious considerations." *Id.* at 1411. The Board underscored that the inquiry should be "limited": the Board should "not examine faculty members' actual performance of their duties," "look behind the[ ] [university's] documents," or "inspect the

university's actual practice with respect to faculty members." *Id.* at 1411-12.

As explained above, *see supra* pp. 12-17, "the [U]niversity's public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations." *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1413 n.19. The University's documents clearly show that it expects applicants to be willing to support its religious mission in order to be hired. *See, e.g.*, JA569 [Er. Ex. 18, at 2]; JA670-71 [Er. Ex. 33]; JA672 [Er. Ex. 34, at 1]; JA676-79 [Er. Ex. 36]; *see also* JA252-53 [Tr. 263-64]. And, once hired, adjunct faculty must not be hostile to the University's mission or their contracts will not be renewed. JA74, 77 [Regional Director's Decision at 7, 10]; JA228, 272-73 [Tr. 125, 294-95]; JA776 [Union Ex. 9, at 19 n.2]. Moreover, the University encourages its adjunct faculty to embrace its Catholic, Spiritan mission in their courses, regardless of the courses they teach. In particular, the University links its mission to performance outcomes measuring students' ethical, moral and spiritual growth and requires adjunct faculty to "respect the religious and ecumenical orientation of the University." JA770 [Union Ex. 9, at 12]; *see also The Dimensions of a Duquesne Education*, *supra*; JA265, 270 [Tr. 276, 281].

Based on this undisputed evidence, the Board should have declined jurisdiction, as it recently did in *Carroll College*, No. 19-RC-165133 (Jan. 19, 2016), where similar evidence was presented. *See* JA136 [Duquesne's *Reliant*

Letter at 1] (informing Board of Regional Director's decision in *Carroll College*). In *Carroll College*, a Regional Director of the Board declined to exercise jurisdiction because the college reserved the right to discharge faculty for serious cause, defined by the Faculty Handbook to include "'continued serious disrespect or disregard for the Catholic character or mission' of the College." The Board affirmed, "agree[ing] that the Regional Director properly declined jurisdiction under *Pacific Lutheran*." Order at 1 n.1, *Carroll Coll.*, No.19-RC-165133 (N.L.R.B. May 25, 2016). But Duquesne may also terminate even tenured faculty for "Serious Misconduct," which is defined to include "failure to observe the principles of the Mission Statement of Duquesne." JA776 [Union Ex. 9, at 19 n.2]. And the Regional Director here expressly found that the University prohibits its adjunct faculty from being "hostile" to the University's religious mission. JA72, 74, 77 [Regional Director's Decision at 5, 7, 10]. The Board's failure to follow its prior decision in light of that finding, or to explain why it was not doing so, renders its decision arbitrary. *See Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995) ("It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent.").

Even more troubling, the Regional Director engaged in precisely the type of improper "'trolling' through [the] [U]niversity's operation to determine whether and how it is fulfilling its religious mission" that even *Pacific Lutheran* forbids.

361 N.L.R.B. at 1411. She considered whether adjunct faculty members were "personally informed" of their religious responsibilities. JA73, 78 [Regional Director's Decision at 6, 11]. She also asked whether the University's application form for adjunct positions was "always utilized" and whether there was "evidence of any complaints concerning adjuncts who were 'hostile' [to the University's religious mission] or who have been disciplined." JA72, 74 [*Id.* at 5, 7]. And, as stated previously, she ignored Duquesne's strategic plans and its training for department chair hiring—which call for the University's religious mission to be a factor in adjunct faculty hiring—because there was no "evidence in the record . . . as to how hiring is actually accomplished." JA72 [*Id.* at 5]. This searching inquiry for "specific substantial evidence," JA78 [*Id.* at 11], is clearly inconsistent with the *Pacific Lutheran* test's limited "holding out" analysis.

Because there is no need for the Court to defer to the Board's application of *Pacific Lutheran*, *see supra* p. 25, there is no need for a remand. The Court should simply vacate the Board's Order on this basis, in addition to the other grounds stated above.

IV. THE BOARD'S ORDER VIOLATES RFRA.

RFRA prohibits government actions that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the action is the "least restrictive means of furthering [a] compelling

governmental interest." 42 U.S.C. § 2000bb-1(a), (b). The statute applies to nonprofit corporations such as Duquesne. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014). Although the RFRA and *Catholic Bishop* analyses overlap, *Great Falls* makes clear that they are not coextensive:

> RFRA presents a separate inquiry from *Catholic Bishop*. Under *Catholic Bishop*, the NLRB must determine whether an entity is altogether exempt from the NLRA. We have laid forth a bright-line test for the Board to use in making this determination. However, a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* may not foreclose a claim that requiring that entity to engage in collective bargaining would "substantially burden" its "exercise of religion." Moreover, even if the act of collective bargaining would not be a "substantial burden," RFRA might still be applicable if remedying a particular NLRA violation would be a "substantial burden."

278 F.3d at 1347 (citation omitted). RFRA thus provides a separate and independent basis for vacating the Board's Order.

The phrase "exercise of religion" under RFRA means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(a). Religious exercise is protected under RFRA so long as it is "sincerely based on a religious belief," *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (applying the Religious Land Use and Institutionalized Persons Act of 2000, a sister statute to RFRA), even if that belief might seem implausible or unreasonable to others, *Hobby Lobby*, 134 S. Ct. at 2778. Duquesne's pursuit of

its Catholic, Spiritan mission to "serve[ ] God by serving students" in a manner consistent with Catholic teaching easily qualifies as religious exercise.

Here, the Board's Order substantially burdens the University's religious exercise because, as discussed above, *supra* pp. 40-46, the collective bargaining process will pressure Duquesne to concede matters vital to its religious mission or risk facing Board sanctions based on unfair labor practice charges or even a strike. *See Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (government action substantially burdens religious exercise under RFRA when it "puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs'" (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981))). The chilling effect of the Board's bargaining order is manifest. As the Seventh Circuit explained in *Catholic Bishop*, "the very threshold act of certification of the union necessarily alters and impinges upon the religious character" of a religious school because authorities are required to "share 'some decision-making' with the union and, as a practical matter, must now consult the lay faculty's representative on all matters bearing upon the employment arrangement." *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1123 (7th Cir. 1977), *aff'd*, 440 U.S. 490.

And the Board, in turn, cannot possibly satisfy the "exceptionally demanding" strict scrutiny test that governs under RFRA. *Hobby Lobby*, 134 S. Ct. at 2780. It is well settled that the Government cannot establish a compelling

interest under RFRA when the law in question already exempts many other individuals from its reach. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-33 (2006) (statutory and regulatory exemptions from Controlled Substances Act precluded Government's assertion of compelling interest in applying it to sacramental use of narcotic); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (internal quotation marks omitted)).

That is exactly the case here. The NLRA expressly exempts wide swaths of the U.S. labor market from its reach, including federal, state, and local employers, federal reserve banks, agricultural laborers, independent contractors, individuals employed by a parent or spouse, and domestic employees. 29 U.S.C. § 152(2)-(3). The Board is also authorized to decline jurisdiction over other employers in its discretion, *id.* § 164(c)(1), and it has repeatedly done so. *See, e.g.*, 29 C.F.R. § 103.1-3 (declining jurisdiction over certain nonprofit colleges and universities, symphony orchestras, and "the horseracing and dogracing industries"). Indeed, for decades the Board declined jurisdiction over *all* nonprofit educational institutions, based on its determination that exercising jurisdiction "would not effectuate the purposes of the Act." *Catholic Bishop*, 440 U.S. at 497.

And as discussed above, even under *Pacific Lutheran*, a Regional Director recently declined to exercise jurisdiction over a religiously affiliated college in a case materially indistinguishable from this one. *See supra* p. 50. These exemptions make it impossible for the Board to establish that it has a compelling interest in asserting jurisdiction under the NLRA over Duquesne's relationship with its adjunct faculty.

CONCLUSION

For the foregoing reasons, this Court should grant Duquesne's petition for review, deny the Board's cross-application for enforcement of the Order, and vacate the Board's Order.

Respectfully submitted,

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§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly

communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

42 U.S.C. § 2000bb

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb-4

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,478 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Stanley J. Brown
Stanley J. Brown

CERTIFICATE OF SERVICE

I certify that on November 6, 2018, the foregoing Final Opening Brief For Petitioner/Cross-Respondent was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Stanley J. Brown
Stanley J. Brown